Ayer Itam Height Sdn Bhd & Ors v Chung Nyuk Sen @ Henry Chung

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-02-152 OF 1997
MOHD SAARI, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA
14 APRIL 2003

Civil Procedure *— Trial — Preliminary issue — Questions of law ordered to be tried first — Questions of law decided in favor of plaintiff — Whether it was necessary for High Court to conduct a full trial to try other issues — Rules of the High Court 1980 O 33 rr 2, 3(2), 5*

The plaintiff/respondent was the co-owner of a piece of land in Sandakan ('the said land'). Pursuant to the terms of a deed dated 28 July 1984 ('the deed'), the plaintiff/respondent transferred the said land to the first defendant/appellant ('D1') for development. Under cl 4 of the deed, the land owner (plaintiff/respondent) agreed to allow the developer (first defendant/appellant) a period of six months to obtain approval from the relevant authorities for the development of the Phase 1 project. The other defendants/appellants were the guarantors. The first defendant/appellant only applied for permission to commence building works about one and a half years after expiry of the six month period stated in cl 4 of the deed and failed to develop the said land. Consequently, the plaintiff sued the defendants for breach of contract. By a court order, two questions of law were ordered to be tried first pursuant to O 33 rr 2, 3(2) and 5 of the Rules of the High Court 1980. The learned judge found, on the two questions of law, for the plaintiff/respondent and disposed the whole action without going to a full trial. Thus, judgment was entered for the plaintiff/respondent and the defendants/appellants were ordered to pay damages to be assessed and interest. At the hearing of this appeal, the defendants/appellants submitted that, notwithstanding the finding of the learned judge on the two questions, a full trial was necessary to try the other issues.

Held, dismissing the defendants' appeal:

From the facts and surrounding circumstances, it was clear that D1 (the first defendant/appellant) had failed to take necessary actions as envisaged under cl 4 of the deed. As such, it was not necessary for the High Court to conduct a full trial to try the other issues on the basis that D1 (the first defendant/appellant) was in breach of cl 4 of the deed (see p 485B–D); *Everett v Ribbands & Anor* [1952] 1 All ER 823 followed.

[Bahasa Malaysia summary

Plaintif/responden adalah pemilik bersama sebidang tanah di Sandakan ('tanah tersebut'). Menurut terma-terma surat ikatan

bertarikh 28 Julai 1984 ('surat ikatan tersebut'), plaintif/responden telah memindahmilik tanah tersebut kepada defendan/perayu pertama ('D1') untuk dibangunkan. Di bawah peruntukan klausa 4 surat ikatan tersebut, pemilik tanah (plaintif/responden) telah bersetuju untuk membenarkan pemaju (defendan/perayu pertama) tempoh enam bulan bagi mendapatkan kebenaran dari pihak-pihak berkuasa yang relevan untuk memajukan projek Fasa 1 tersebut. Defendan-defendan/perayu-perayu lain merupakan penjamin-penjamin surat ikatan tersebut. Defendan/perayu pertama hanya memohon kebenaran untuk memulakan kerja-kerja pembinaan satu setengah tahun selepas tarikh luput tempoh enam bulan yang dikatakan di dalam klausa 4 surat ikatan dan telah gagal membangunkan tanah tersebut. Sebagai akibat, plaintif/responden telah mendakwa defendan-defendan/perayu-perayu atas kemungkiran perjanjian. Melalui satu perintah mahkamah, dua soalan undang-undang telah diperintahkan supaya dibicarakan dahulu menurut A 33 kk 2, 3(2) dan 5 Kaedah-Kaedah Mahkamah Tinggi 1980. Hakim yang bijaksana telah mendapati, di atas dua persoalan undang-undang tersebut, untuk plaintif/responden dan telah menyelesaikan keseluruhan tindakan tersebut tanpa perbicaraan penuh. Penghakiman telah diberkan kepada plaintif/responden dan defendan-defendan/perayu-perayu telah diperintahkan membayar ganti rugi yang akan dinilai dan faedah. Semasa pendengaran rayuan ini, defendan-defendan/perayu-perayu telah berhujah bahawa, tanpa mengira penemuan hakim yang bijaksana di atas dua persoalan tersebut, perbicaraan penuh adalah perlu untuk membicarakan isu-isu yang lain.

Diputuskan, menolak rayuan defendan-defendan:

Berdasarkan fakta-fakta dan keadaan sekeliling, adalah jelas bahawa D1 (defendan/perayu pertama) telah gagal untuk mengambil apa-apa tindakan yang perlu sebagaimana yang dibayangkan di bawah klausa 4 di dalam surat ikatan tersebut. Oleh demikian, ia adalah tidak perlu untuk Mahkamah Tinggi mengendalikan satu perbicaraan penuh untuk membicarakan persoalan-persoalan lain berdasarkan D1 (defendan/perayu pertama) telah melanggar klausa 4 kepada surat ikatan tersebut (lihat ms 485B–D); *Everett v Ribbands & Anor* [1952] 1 All ER 823 diikut.]

Notes

For cases on preliminary issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 6426–6432.

Cases referred to

Everett v Ribbands & Anor [1952] 1 All ER 823 (folld)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)

Legislation referred to

Rules of the High Court 1980 O 33 rr 2, 3(2), 5

Appeal from: Suit No S 11 of 1989 (High Court, Sandakan)

Francis Wong (*Peter Lo & Co*) for the appellants/defendants.
Marina Tiu (*Yap Chin & Tiu*) for the respondent/plaintiff.

Mohd Saari JCA (delivering judgment of the court): This is an action by the respondent ('the plaintiff') against the four appellants ('the defendants') for breach of contract. In the court below, the learned judge entered judgment for the plaintiff and the defendants were ordered to pay damages to be assessed and interest, hence this appeal.

The gist of the case is that at all material times, the plaintiff was the co-owner of an undivided share of land held under Sandakan Lease No 10266 ('the said land'). Under a deed dated 28 July 1984 ('the deed'), the plaintiff agreed to transfer the said land to the first defendant ('D1') for development. The plaintiff had since transferred the said land to D1 but D1 had failed to develop the said land. The other defendants were guarantors to the deed.

On 11 March 1989, the plaintiff issued a writ against the defendants. By an order of the court dated 12 February 1990, two questions of law were ordered to be tried first pursuant to O 33 rr 2, 3(2) and 5 of the Rules of the High Court 1980. The two questions are as follows:

(a) whether upon a true construction of the deed dated 28 July 1984 (a copy of which is annexed hereto and marked 'A1' to 'A12' and to be referred to hereinafter as the deed) the final approval for the development of the Phase 1 project referred to in cl 4 of the deed was:

  (i) obtained on 19 June 1984 when the Sandakan Municipal Council approved the building plans (No S1182/1/2A to S1182/1/4A and No S1182/2/2A to S1182/2/5A); or

  (ii) obtained on 19 June 1984 when the Sandakan Municipal Council endorsed on the said building plans (No S1182/1/2A to S1182/1/4A and No. S1182/2/2A to S1182/2/5A) the words: 'Commencement of construction of buildings to be subjected to final approval of engineering development plans'; or

  (iii) obtained at all.

(b) whether, assuming that there is no final approval for the development of the Phase 1 project, the defendants can rely on the failure of the first defendant to obtain or to apply at all for the final approval for the development of the Phase 1 project within six months of 28 July 1984 to invoke cl 4 of the deed to treat the deed as null and void and of no effect.

On the two questions

It is part of the agreed facts that prior to executing the deed on 28 July 1984, the following were already submitted to the Sandakan Municipal Council, namely:

(1) layout and subdivision plan (S1182/lB) which was approved in principle on 8 July 1982 and approved on 5 April 1983;

(2) earth moving, road retaining wall layout plan (S1182/2B) which was approved on 5 April 1983;

(3) structural and engineering plans for the infrastructures (S1182/3 to S1182/15) which were approved on 12 May 1983 and on 4 February 1985;

(4) site and locality plan for semi-detached houses (S1182/1/1A) which plan was approved on 27 June 1983 and on 19 June 1984;

(5) building plans for semi-detached houses (S1182/1/2A to S1182/1/4A) which were approved on 27 June 1983 and on 19 June 1984;

(6) site and locality plan for terraced houses (S1182/2/1A) which plan was approved on 23 June 1983 and on 19 June 1984; and

(7) building plans for terraced houses (S1182/22A to S 1182/2/5A) which plans were approved on 23 June 1983 and on 19 June 1984.

Be it noted that there was delay in D1 applying for approval of the engineering plan and also in applying for permission to commence work. The engineering plan was approved on 4 February 1985. D1 only applied for permission to commence building works on 21 July 1986 which was about one and a half years after expiry of six months from the date of the deed. Clause 4 of the deed expressly provides for the approval of the plans to be obtained within six months from the date of the deed.

On the first question, the finding of the learned judge was that the expression 'final approval for the development of Phase 1 project' appearing in cl 4 of the deed should be taken to mean approval by the Council of all plans including structural and engineering plans.

With regard to the second question, the finding of the learned judge was in the negative on the premise that if the finding were to be otherwise, it would tantamount to allowing D1 to take advantage of its own wrong (see *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302).

At the hearing of this appeal, no attempt was made by the appellants (the defendants) to argue against the finding of the learned judge on the two questions. Instead, for the appellants, it was submitted that, notwithstanding the finding of the learned judge on the two questions, a full trial was necessary to try the other issues.

In response to the appellants' submission, the learned counsel for the respondent (plaintiff) submitted that the learned judge was right in substantially disposing the whole action after having considered the two questions of law. In the judgement of the learned judge at p 39 of appeal record, it states:

> I am of the opinion, therefore, that the first defendant by not taking the necessary steps which it was required to take under cl 4 committed a breach of duty owed to the plaintiff.

A For ease of reference, cl 4 of the deed is reproduced below:

> The Land Owner hereby agrees to allow the Developer a period of six (6) months from the date hereof to obtain from the relevant authorities the final approval for the development of the Phase 1 project. If the Developer fails to do so within the aforesaid period the said property shall revert back to the
B Land Owner whereupon this Agreement and all relevant documents guarantee and power of attorney created pursuant to this Agreement shall terminate and be deemed to be null and void and of no effect. In such event the Developer shall execute all documents necessary to facilitate the return and retransfer to the Land Owner of the title to the said property free from all encumbrances.

C From the facts and surrounding circumstances, it is abundantly clear that D1 had failed to take necessary actions as envisaged under cl 4 of the deed. In *Everett v Ribbands & Anor* [1952] 1 All ER 823 at p 827, Romer LJ said:

> *Where there is a point of law which, if decided in one way, is going to be decisive of litigation*, advantage ought to be taken of the facilities afforded by the rules of
D court to have it disposed of at the close of pleadings or very shortly afterwards. (Emphasis added.)

Thus, in view of the foregoing, we agree with the learned judge that it was not necessary for the court below to conduct a full trial to try the other issues on the basis that D1 was in breach of cl 4 of the deed.

E In the premise and for reasons abovestated, we dismiss the appeal with costs. Further, we order the deposit to be paid to the respondent towards account of taxed costs.

Defendants' appeal dismissed.

F Reported by Lim Lee Na

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